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No. 82-1384

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALCAN SALES, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that Section 9(a) of the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. 9(a), authorized it to bring an action to recover an import surcharge lawfully imposed by the President under Section 5(b) of that Act, 50 U.S.C. App. (& Supp. V) 5(b).

1. In 1971, the President responded to a growing domestic and international economic crisis by imposing a 10% ad valorem surcharge on most dutiable imports. This surcharge was imposed pursuant to Section 5(b)(1) of the TWEA, 50 U.S.C. App. 5(b)(1), which, among other things, empowered the President to regulate international trade "[d]uring * * * any period of national emergency declared

by the President."[1] Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 comp.) (Pet. App. 17a-21a). The President removed the surcharge less than five months later (Proclamation No. 4098, 3 C.F.R. 94 (1971-1975 comp.)) (Pet. App. 22a-24a), after the "Smithsonian Agreement" among ten major industrial nations "gave promise of ending the balance of payments problem" (*id.* at 34a-35a).

While in effect, the surcharge was imposed on certain aluminum ingots imported by petitioner from Canada. Petitioner's challenge to the President's authority to impose the surcharge was rejected by the United States Court of Customs and Patent Appeals (*Alcan Sales* v. *United States*, 534 F.2d 920 (C.C.P.A.), cert. denied, 429 U.S. 986 (1976) ("*Alcan I*")), which relied upon its comprehensive decision concerning the same issue in *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).

2. The same surcharge was imposed on the entry of another shipment of aluminum imported by petitioner, and petitioner's protest was again denied. Petitioner then brought this action to recover the surcharge under Section 9(a) of the TWEA in the United States Court of International Trade (formerly the United States Customs Court). Petitioner asserted jurisdiction under both Section 9(a) and

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[1] In 1977, Congress deleted the reference in Section 5(b)(1) (50 U.S.C. App. 5(b)(1)) to a "period of national emergency declared by the President." Pub. L. No. 95-223, Section 101(a), 91 Stat. 1625. The President still has the power to declare an emergency and impose economic restrictions under the National Emergencies Act, 50 U.S.C. (& Supp. V) 1601 *et seq.*, and the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) 1701 *et seq.* See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Congress has also specifically authorized the President, when required by international monetary difficulties, to impose by proclamation temporary import surcharges and temporary limitations through the use of import quotas. 19 U.S.C. 2132.

28 U.S.C. (Supp. V) 1581[2] (Pet. App. 47a-48a). Section 9(a) permits the filing of claims for property seized by or transferred to the Alien Property Custodian, and it authorizes suit in district court if such a claim is denied. Under 28 U.S.C. (Supp. V) 1581, the Court of International Trade is given exclusive jurisdiction of civil actions contesting the denial of tariff protests under Section 515 of the Tariff Act of 1930, 19 U.S.C. (Supp. V) 1515.

Petitioner did not challenge the Court of Customs and Patent Appeals' prior decisions in *Yoshida* or *Alcan I*, which upheld the validity of the surcharge imposed in Proclamation 4074 (Pet. App. 45a). Instead, petitioner asserted (*id.* at 46a) that the surcharge amounted to a "taking" of property that was recoverable under Section 9(a). The United States argued that the Court of International Trade lacked jurisdiction over the subject matter because actions under Section 9(a) lie only in district court; that petitioner's action under Section 9(a) of the TWEA was barred by the statute of limitations; and that because of petitioner's prior unsuccessful challenge to the surcharge in *Alcan I*, this action was foreclosed by the doctrines of res judicata and collateral estoppel (Pet. App. 46a).

The Court of International Trade concluded that it had subject matter jurisdiction under 28 U.S.C. (Supp. V) 1581(a) but granted summary judgment for the United States on the ground that Section 9(a) of the TWEA was inapplicable to this case (Pet. App. 56a). The court noted (*id.* at 48a-51a) that the TWEA confers upon the President

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[2]The United States Customs Court became the United States Court of International Trade on November 1, 1980, pursuant to the Customs Court Act of 1980, 28 U.S.C. (Supp. V) 251. The jurisdictional provision for actions against the United States in the Customs Court, 28 U.S.C. 1581, was repealed and replaced by 28 U.S.C. (Supp. V) 1582, which provides for such actions in the Court of International Trade.

two separate powers: (1) the power to regulate international commerce and (2) the power "to vest in an agency designated by him 'any property or interest of any foreign country or national thereof' "(*Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 485 (1947)). The court then concluded (Pet. App. 51a-52a) that Section 9(a) applies only when the latter power is exercised.

The court of appeals affirmed (Pet. App. 31a-42a; 693 F.2d 1089 (1982)). The court agreed with every other court that has addressed the issue that Section 9(a) "is [not] applicable to those provisions of section 5(b) of the TWEA that empower the President to regulate foreign trade" but rather applies only to actions involving an exercise of the President's power to seize and hold enemy property (Pet. App. 38a). See also *Cornet Stores* v. *Morton*, 632 F.2d 96 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); *Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979).

3. The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and therefore does not merit further review.

a. Petitioner does not dispute the President's authority to impose the surcharge under Section 5(b) of the TWEA (Pet. App. 45a-46a). Indeed, petitioner could not do so in light of *Alcan I*, which decided that very issue against it. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 671-673 (1981); *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Propper* v. *Clark*, 337 U.S. 472, 493 (1949).

Instead, petitioner argues that, even though the surcharge is valid under Section 5(b), it constitutes a "vesting" of its property. Petitioner therefore maintains that it is entitled to recover the lawfully imposed surcharge under Section 9(a). This argument, which would make nonsense

of the statute, was properly rejected by both courts below. As the court of appeals remarked (Pet. App. 40a), "it seems highly unlikely that Congress would give the President broad regulatory powers under section 5(b) in order that he could deal effectively with national emergencies and then subject these powers to section 9(a), which might render the delegated powers useless."

Petitioner's reasoning would produce absurd results. Although the government could constitutionally impose taxes, customs, and duties, those who pay them would be entitled to recover those sums under the Taking Clause of the Fifth Amendment. This Court rejected such an argument long ago. "[T]he Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause [of the Fifth Amendment]." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24 (1916) (progressive income tax on corporations not Fifth Amendment taking of property of shareholders without compensation).

Petitioner's contention is not supported by any of the cases involving the TWEA upon which it relies. Those cases involved property that had been seized by the government as belonging to or tainted by interests of enemies of the United States. See, *e.g.*, *Societe Internationale* v. *Rogers*, *supra*. The sole function of Section 9(a) of the Act is to permit persons who claim not to be enemies to establish that fact and to recover for their interests in any property seized. Here, the President was not exercising his authority to seize enemy property; he was instead exercising his authority to regulate foreign economic activity by imposing a surcharge on imports. It is therefore obvious that Section 9(a) has nothing to do with this case and does not authorize recovery of the lawfully imposed surcharge.

The Court of Customs and Patent Appeals has correctly recognized the breadth of this Court's decisions concerning

the constitutional power to impose duties on foreign trade. *United States* v. *Yoshida International Inc., supra,* 526 F.2d at 580. The Constitution does not confer the right to engage in foreign commerce free of restrictions. Thus, "a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution" (*Buttfield* v. *Stranahan,* 192 U.S. 470, 493 (1904)). As Justice Cardozo wrote for the Court in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 318 (1933), "[n]o one has a legal right to the maintenance of an existing rate or duty." See also *FEA* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 559 (1976) (upholding Presidential license fee to reduce dependence on foreign oil).[3] Moreover, since Congress explicitly authorized the President to impose import surcharges to deal with balance of payments problems in the Tariff Act of 1974, 19 U.S.C. 2132, this case has no continuing significance.

b. Even assuming *arguendo* that petitioner had a colorable "taking" claim on the basis of the President's surcharge, the courts below lacked jurisdiction to consider it. A claim for such a "taking" may only be brought under the Tucker Act, and jurisdiction over such actions lies in the Claims Court (28 U.S.C. (Supp. V) 1491) or, if the claim does not exceed $10,000, in district court (28 U.S.C. (Supp. V) 1346 (a)(2)). See *Dames & Moore* v. *Regan, supra,* 453

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[3]Import duties designed to foster the well-being of the United States date from the beginning of the Republic. Indeed, the first order of business of the First Congress, after establishing the oaths of office under Article VI of the Constitution, was to enact duties on imports "for the support of the government, for the discharge of debts of the United States, *and the encouragement and protection of manufactures* * * *," Act of July 4, 1789, ch. 2, Section 1, 1 Stat. 24 (emphasis added). The validity of such protective duties and the right of the President to adjust the rates have long been recognized. *Hampton & Co.* v. *United States,* 276 U.S. 394 (1928).

U.S. at 689-690. An action under Section 9(a) of the TWEA is not an action to recover for a "taking"; it is an action to determine whether vested property is free of enemy taint and therefore whether the claimant is entitled to recovery.[4]

c. Petitioner's sole recourse to test the validity of the President's surcharge under Proclamation 4074 was to file a protest under the Tariff Act of 1930, 19 U.S.C. (& Supp. V) 1514.[5] Denial of such a protest is subject to review by the Court of International Trade (formerly the Customs Court) under 28 U.S.C. (Supp. V) 1581(a) (formerly 28 U.S.C. 1582). Petitioner followed this procedure in *Alcan I* and did not prevail. There is no basis for further litigation of the identical claim here.[6]

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[4]In any event, petitioner's claim that the lawful imposition of a surcharge on imports constitutes a "taking" is frivolous. "The Takings Clause * * * preserves governmental power to regulate, subject only to the dictates of " 'justice and fairness' " (*Andrus* v. *Allard*, 444 U.S. 51, 65 (1979) (citations omitted)). "Suffice it to say that government regulation — by definition — involves the adjustment of rights for the public good * * *. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*" (*ibid.*; emphasis in original). The fundamental reason that there is no taking is that the Taking Clause is not a limitation on the constitutional power to tax or levy duties or surcharges on imports. *Brushaber* v. *Union P. R. R.*, *supra*.

[5]Congress specifically extended to five years the time for review and administrative action on duly filed protests of import surcharges under Proclamation No. 4074. Trade Act of 1974, Pub. L. No. 93-618, Section 611, 88 Stat. 2075.

[6]Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). This " 'is a rule of fundamental and substantial justice * * * which should be cordially regarded and enforced by the courts * * *' " (*id.* at 401; citation omitted). Petitioner's prior suit to challenge the validity of the surcharge and recover the sums paid pursuant to it was decided against petitioner, and this Court declined review. *Alcan I*, *supra*. Although this case involves

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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the surcharge imposed on a different shipment of goods, in all other respects the cases are identical; any legal grounds for challenging the surcharge could and should have been raised in *Alcan I*. The court of appeals correctly held that the decisions of the Court of Customs and Patent Appeals in *Alcan I* and *Yoshida* "conclusively established that Presidential Proclamation No. 4074 was a valid exercise of the authority delegated to the President under the regulatory provisions of section 5(b)" (Pet. App. 41a).

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